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SUPREME COURT, U. S.

Supreme Court, U.S.
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In The
Supreme Court of the United States

OCTOBER TERM, 1970

NO. 608

LEO F. BAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

v.

JACKSONVILLE SHIPYARD, INC.,

Respondent.

RESPONDENT JACKSONVILLE SHIPYARD, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioner, hereafter, will be "Baum", or the plaintiff--as in the trail court. The Respondent United States of America will be designated as "the Government"; and the Respondent Jacksonville Shipyard, Inc. will appear herein as "the shipyard."

References to the main printed Appendix will be made in parentheses as follows: (A.); and references to the Supplemental Appendices filed herein will be made as follows: (S.A. [1]), indicating the supplemental appendix containing the ship repair contract, and (S.A. [2]), indicating the appendix containing more of the transcript of the testimony.

QUESTIONS PRESENTED

Respondent Jacksonville Shipyard, Inc. is not satisfied with either Petitioner's statement of the questions presented for review, or with the argumentative and factually unsupported manner in which said questions are framed, and would, instead, prefer to state the questions presented as follows:

The only real question presented for review herein is whether or not, under the facts and circumstances of this case, the United States owed a duty to the Petitioner, a shipyard worker, working aboard its vessel which was in drydock undergoing extensive repairs, to provide him with a safe place to work.

In order to answer this question, we feel that the following subsidiary questions must first be determined:

1. Did the United States, through the presence on board the vessel of its marine surveyor, and the provisions contained in the ship repair contract, retain sufficient "control of the ship" and the details of the shipyard's work, including the incident which allegedly created the risk to the Petitioner, so as to impose upon it a duty to see to it that the shipyard's employee, Leo F. Baum, was provided with a safe place to work?

2. Was the allegedly unsafe condition of which Petitioner

complains a "latent" one, created prior to the United States' relinquishment of control of the vessel?

3. Did the "work of repair" create the allegedly unsafe condition of which Petitioner complains?

4. Assuming arguendo that the United States had "control of the ship" and the details of the shipyard's work at the time of Petitioner's injury, did the United States have actual or constructive knowledge either that (a) the use per se of discarded five gallon paint buckets to haul debris from the interior of the vessel was inherently dangerous to human safety, or (b) that the Petitioner was working directly below where said buckets were being used, so as to perhaps cast upon the United States a duty to take reasonable precautions to prevent injury to the Petitioner, i.e., stop said practice?

* * * * *

No reference will be made herein to Petitioner's Question 1, as we concede that the Public Vessels Act, 46 U.S.C. §781, and the federal maritime law govern the liability of and duties owed by the Government to the Petitioner herein, if any, although we do feel that resort can and must, in some circumstances, be had to cases arising under the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2674, insofar as the principles of the law of agency and independent contractors and interpretion of contracts is concerned, as that law does not, we submit, run afoul of the federal maritime law, and the principles laid down by this Court in *Kemerac v. Compagnie Generale Transatlantique*, 358 U.S. 625, 3 L. Ed. 2d 550, 70 S.Ct. 406 (1959).

Nor will any reference be made herein to Petitioner's Question 4, as we submit with deference that there is no constitutional question involved in this case, and respectfully suggest that the alleged violation of Petitioner's rights under the Fifth

Amendment is merely an imaginative, though unfounded, argument advanced by his able counsel.

SUMMARY OF ARGUMENT

The Government owed no duty to the plaintiff herein to provide him with a safe place to work because, inter alia, the Government surrendered custody and control of the vessel to the shipyard for extensive repairs and reactivation, it did not, either through the presence on board of its marine surveyor or the provisions of the repair contract, retain "control of the vessel" or the details of the contractors' work, the "work of repair" created the alleged danger which resulted in the plaintiff's injuries, the danger did not arise from an inherent or "latent" defect present on the vessel prior to the Government's surrender of control thereof, and; consequently, this case is governed by the principles of law laid down by this Court in *West v. United States;* 361 U.S. 118, 4 L.Ed. 2d 161, 80 S. Ct. 189 (1959).

STATEMENT OF THE CASE

The plaintiff brought suit against the Government in the United States District Court for the Middle District of Florida under the Suits in Admiralty Act, 46 U.S.C. §§741, et seq., and the Public Vessels Act, 46 U.S.C. §§781, et seq., for injuries received while working as a machinist employed by Respondent Jacksonville Shipyard, Inc., on board the dry-docked vessel, the S.S. Cape San Martin, which was owned by the Government, and which was undergoing a reactivation overhaul in Jacksonville, Florida, pursuant to a contract between the Government and Jacksonville Shipyard, Inc.

The Government, in turn, brought a third-party action

against the shipyard on the theory that the liability of the Government, if any, was occasioned by the shipyard's breach of its implied warranty of workmanlike performance.

The evidence introduced at the trial below revealed the following:

The Government entered into a "Master Lump Sum Repair Contract" (S.A.[1], 8-66) with the shipyard for the repair and reactivation of the Government's vessel, the S.S. Cape San Martin, which had been in the "moth ball fleet" in the Hudson River. In accordance with Article 4(c) of the contract (S.A. [1] 19) the Government placed its marine surveyor, Jackson Springs, on board the vessel, and he remained aboard, periodically, during the entire period of repair (A. 74-82, 107).

Despite the presence on board the vessel of the Government's surveyor, however, the Government retained no "control of the ship" or the details of the shipyard's work.

The contract itself expressly provided, in Article 5(a), that "On entering and leaving a yard, pier, drydock or marine railway, the Contractor (the shipyard) shall have charge of and be responsible for the vessel within the limitations of this contract from the time the Contractor's lines are secured to the vessel until such time as all the Contractor's lines are cast off" (S.A. [1] 22).

The contract did, indeed, give Springs certain rights and impose upon him certain duties (Contract Articles 4(a), (c), (f) and (k), 9 (a) and 26 (a) (2). (S.A. [1] 18-22, 26 and 40 respectively; but a mere reading of the pertinent provisions of the contract, together with Springs' testimony, makes it abundantly clear that any powers given to Springs under the contract were designed simply to enable Springs to see to it

that the shipyard fulfilled its obligations, insofar as the contents of the contract were concerned, to reactivate the vessel at a minimum cost to the Government. These powers did not give Springs any control of the vessel or the details of the shipyard's work.

Springs' testimony reveals that he merely went on board the ship periodically to check the progress of the work (A. 70-71, 76). Although he testified that he considered it his duty as marine surveyor to supervise the contractor to see to it that all the workmanship, equipment, materials, articles and all operational practices were "the best commercial marine practices," and that if the contractor departed from any of those items he considered it his duty to complain to the management of the yard (A. 102-103), he had no control over the yard's *procedure of work* (A. 119). Only if the work jeopardized the ship or an individual would he comment about it to someone connected with the shipyard (A. 119). All he did was verify the *quality* of the work and the completion of the work (A. 111); and at no time did he ever give any orders or instructions to the shipyard's personnel (A. 112). His sole function, then, was one of inspection and supervision, to insure that the plans and specifications of the contract were complied with by the shipyard. This, to him, meant inspection of the various parts of the vessel to obtain the best possible reactivation, and to get it with the minimum cost to the Government, over and above the original agreed bid contract (A. 113-114).

On the day in question, the plaintiff was assigned by his leaderman, William R. Matthews, to work on a valve in the lower engine room (S.A. [2] 29-30). When he reported to the area, however, he discovered that another craft, the labor gang, was already working directly above where he would have to work, hauling rust scale and other debris from the

bilge by means of empty five gallon paint buckets and a block and tackle (A. 160-161, 170-179, 186; S.A. [2] 97).

Confronted with this obvious conflict in work assignments, the plaintiff was *not*, as he claims in his Petition (p. 6) *required* to work in this area! Mr. Matthews testified that generally, when two crafts are assigned to work in the same area on a ship, and their work will conflict, the craft with the highest priority remains and the other craft works elsewhere; and the job which plaintiff was assigned to do had no particular priority (S.A. [2] 30). Furthermore, if one of his men reported to a work area and found another craft working there, he was under instructions to report back to Mr. Matthews for reassignment to another task (S.A. [2] 31).

The plaintiff never reported back to Mr. Matthews that day about the conflict between his assigned task and the task of the labor gang (S.A. [2] 31), but instead, went ahead and started to work directly below the laborers. Although the plaintiff maintained otherwise, two of the laborers who were working in that same area when the plaintiff arrived, Robert Edwards and David Goosby, both testified that they warned the plaintiff repeatedly to move out of the area, but he refused to do so (A. 187; S.A. [2] 16, 17, 97).

It was while the plaintiff was working below the laborers that the bail, or handle, on one of the buckets pulled loose and the bucket fell, strking plaintiff on the the head. The removal of debris by the labor gang was clearly part of the repair work and reactivation of the vessel called for by the ship repair contract (Article 3(e), S.A. [1] 17); and it was this very repair work which created the condition alleged by the plaintiff to have been unsafe.

There was, however, nothing inherently dangerous about the manner in which the labor gang was removing debris

from the bilge of the vessel. The five gallon paint buckets themselves were not "flimsy," as maintained by the plaintiff in his Petition (p. 6). The bucket handles were designed to hold a full bucket of paint, weighing in the neighborhood of fifty to eighty pounds, and the laborer who was loading the buckets at the time of plaintiff's injury testified that he would never load the buckets more than twenty pounds (S.A. [2] 13).

Furthermore, all of the witnesses testifying on the point stated that for as long as any of them could recall, empty five gallon paint buckets had customarily been used for the purpose of removing debris from the interior of vessels--that it was "the usual way" (A. 179, 180; S.A. [2] 4, 14, 32, 99, 102). Commander John F. Fitzgerald, the Safety Director for Jacksonville Shipyard since 1964 (A-359), testified that it was customary and general within the ship repair business to use discarded paint buckets to haul debris out from ships--indeed, it was "very customary--universal" (A-151). He had been a Coast Guard Inspector in shipyards for seventeen years prior to retiring, and "these buckets have been used continually by the labor gangs, in cleaning out tanks, for their smallness" (A. 151). Indeed, this type of bucket is the only practical way of removing debris through small openings (S.A. [2] 74).

Plaintiff claims that the Government surveyor *knew* that in this trade hoisting containers were "generally" used for this ship-board work which were constructed with heavier handles and were more securely fastened to the bucket (Petition, p.7). This is not true! Springs testified that aluminum buckets are sometimes used on tankers, but the reason for the use of this type of bucket rather than a steel bucket is "to prevent the possibility of spark of explosion, something that might cause an explosion" (A. 92, 113).

Buckets had been seen to fall on rare occasions, but *only* when they were overloaded (A. 188; S.A. [2] 9, 14, 15); and the uncontradicted testimony revealed that the buckets were *not* being overloaded on the day in question (S.A. [2] 15). Nor had anyone ever been hurt by a falling bucket before, according to the testimony (A-188; S.A. [2] 18, 32). On the contrary, the evidence showed that the use of these buckets was perfectly safe if everyone working around them merely took normal precautions for their own safety (A. 209; S.A. [2] 20), i.e., stepping back out of the way as they go up (S.A. [2] 18).

Plaintiff also claims that because the buckets would fall on occasion, shipyard workers had been complaining to their supervisors about the use of these buckets for a period of three years before plaintiff's accident; and that "Springs necessarily knew then of this danger" (Petition, p. 7). This, too, is untrue. Neither the laborer, Edwards (S.A. [2] 12, 14), nor the laborer, Goosby (S.A. [2] 99), nor the plaintiff's leaderman, Matthews (S.A. [2] 32, 45, 49), nor the shipyard's safety director, Commander Fitzgerald (S.A. [2] 74-75), nor the maritime safety officer and district supervisor for the Bureau of Labor Standards in Jacksonville, Florida, Mr. Gardner (S.A. [2] 56), nor, indeed, Springs himself (A. 105, 106, 110-111) had *ever* heard any complaints whatsoever regarding the use of the buckets in the manner which plaintiff contends to have been unsafe!

The above-mentioned Mr. Gardner *did* receive a letter (A. 54-55) from the vice president of a union which, at the time, was attempting to organize Jacksonville Shipyard, though unsuccessfully, in which it was stated that "we have received scores of complaints from Jacksonville Shipyard, Inc., employees" regarding the use of "paint cans and buckets to raise and lower buck . . ." Although this letter was dated January

9, 1967, (one day prior to plaintiff's accident), it was never even mailed until *after* plaintiff's accident. Furthermore, the writer of the letter had never been on the premises of the shipyard (A. 269), and he was unable to support these alleged complaints with any documentary evidence, such as the names of the workers who might have made the complaints referred to in his letter (A. 270-271).

Nevertheless, in response to this letter, Mr. Gardner directed a maritime inspector to make a special inspection of the yard; yet the inspection failed to uncover any situation in violation of the safety and health regulations for ship repairing (A. 252), and no violation notice needed to be served on the yard (S.A. [2] 51-53, 58).

In the face of the testimony averred to above, however, plaintiff has continued to insist throughout these proceedings that the Government surveyor, Springs, *knew* that the use of the paint buckets in the manner in which they were being used constituted a dangerous condition, per se. There is no evidence to support this contention!

Springs was fully aware that the shipyard employees were, prior to January 10, 1967, using empty five gallon paint buckets to haul debris from the vessel, but he had never made any complaints to the shipyard concerning that practice (A. 103). In fact he never saw the shipyard at any time engaged in any practices which he thought were unsafe or dangerous (A. 117, 118). That is, of course, because the use per se of the empty paint buckets was *not* dangerous.

If an unsafe condition *ever* existed with regard to the use of the buckets, it only came into existence when the plaintiff stubbornly insisted on working directly below where the labor gang was working, despite his knowledge that it was dangerous to work there (A. 162, 163), despite instructions from his

foreman not to work in an area where his work would conflict with another craft's work (S.A. [2] 31), and despite numerous warnings by the laborers not to work in that area (A. 187-189; S.A. [2] 97). If this be the dangerous condition of which plaintiff complains, it is clear that the "work of repair" created it.

And there is absolutely no evidence anywhere in the record that the Government, through its agent, Springs, ever knew or *should* have known, that the plaintiff himself had created this allegedly dangerous situation!

The District Court, Middle District of Florida, made Findings of Fact and Conclusions of Law (A. 395-401), and entered judgment in favor of the Government against the plaintiff dismissing the action, and in favor of the Government against Jacksonville Shipyard, Inc. for attorneys' fees expended in the defense of the claim (A. 418).

The United States Court of Appeals for the Fifth Circuit affirmed, holding:

> "Thus, where the Government is not in control of the incident which created the risk (as in *West* [West v. U. S., 361 U.S. 118, 4 L.Ed. 2d 161, 80 S.Ct. 189 (1959)] and as in the case at bar), and where the risk is not a latent one created prior to the Government's loss of control (*Van Horn*, supra [Van Horn v. Gulf Atlantic Towing Corp., 388 F. 2d 636 (4th Cir. 1968)]; White v. United States, 4 Cir., 1968, 400 F. 2d 74) nor an inherently dangerous one wherein the shipowner requires the work to be done in a manner inherenly dangerous to human safety *Halecki v. United New York and New Jersey Sandy Hook Pilots Assn.*, 2 Cir., 1962, 302 F. 2d 840) then it would be 'manifestly unfair' to impose on the Government a duty to pro-

vide safety measures for employees of the contractor.

"The record indicates that the Government had relinquished control of the vessel. The Government was not in control of the work area, the manner of detail performance, nor safety procedures, and it was not a duty of the single inspector on board to take control of same. In fact, there is here much less possibility of control by the Government than in *West*, supra, where the Government had placed six inspectors aboard the dry-docked vessel.

"Therefore, we find that this case is controlled by *West*, supra, and *Moye*, supra [*Moye v. Sioux City and New Orleans Barge Lines, Inc.*, 402 F. 2d 238 (5th Cir. 1968), cert. den. 395 U.S. 913], and we affirm."

Plaintiff has petitioned this Honorable Court for a Writ of Certiorari. With the greatest deference, however, we respectfully submit that the decisions of the District Court and the Court of Appeals were correct, and that there has been no showing by Petitioner that his Petition should be granted.

ARGUMENT

Basically, the only question presented for review herein is whether, under the facts and circumstances of this case, the Government owed a duty to the plaintiff to provide him with a safe place to work. The question is, we submit, controlled both from a factual standpoint, as well as a legal standpoint, by this Court's opinion in *West v. United States*, 361 U.S. 118, 4 L. Ed 2d 161, 80 S. Ct. 189 (1959).

There, as here, the plaintiff was an employee of an independent contractor, and while working inside the main engine

of a government vessel as it was undergoing a complete overhaul at the contractor's repair dock, he suffered injuries when an end plug from a pipe in the water system was propelled through the top of the open cylinder and hit his knee. The repair contract listed the defective water line and plug in the specifications for "cleaning and repair" and the replacement of defective or missing plugs.

The contractor there, as here, was to have complete responsibility and control of the making of repairs, with the right in the United States to inspect the work and materials to insure compliance with the contract. For this purpose, the United States placed six of its men on board the vessel. However, they signed no shipping articles and had no "control of the ship in the ordinarily accepted context," their sole function being to serve as inspectors for the United States.

The plaintiff sought recovery on the theory that the vessel was unseaworthy; and in addition (as in our case), he claimed that the United States was liable for negligence in not maintaining a safe place for him to work, a duty asserted to be non-delegable and absolute.

This Court held that as the ship had been removed from active maritime service, and was undergoing repairs to make it seaworthy, under the circumstances the doctrine of seaworthiness had no application. More important to our case, however, this Court also held that the Government, as the shipowner, did not owe the plaintiff a duty to furnish a safe place to work, nor was it otherwise negligent in failing to keep the water plug tight.

Quoting from that opinion (4 L. Ed. 2d 161, 165, 166):

> "Of course, one aspect of the shipowner's duty to refrain from negligent conduct is embodied in his duty

to exercise reasonable care to furnish a safe place to work. But we do not believe that such a duty was owed under the circumstances of this case. *Petitioner overlooks that here the respondent had no control over the vessel, or power either to supervise or to control the repair work in which petitioner was engaged.* We believe this to be decisive against both aspects of plaintiff's dual theory. There was no hidden defect in the water system. It was one of the objects to be repaired and its plugs were to be replaced where necessary. Its testing was to be done by the contractor--not by the shipowner. *It appears manifestly unfair to apply the requirements of a safe place to work to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the danger which makes the place unsafe.* The respondent, having hired Atlantic to perform the overhaul and reconditioning of the vessel--including the testing--was under no duty to protect petitioner from risks that were inherent in the carrying out of the contract. [Citing *Filipek v. Moore-McCormack Lines, Inc.*, 258 F2d 734 (2nd Cir. 1958)]. Although some of respondent's employees were on board the ship here, this would not attach liability since they gave no orders, and did not participate in the work or supervise its progress, but were simply inspectors or observers."

The facts of our case so closely parallel the facts involved in *West* as to be nearly identical thereto.

Baum, too, was the employee of an independent ship repair contractor, engaged to repair and reactivate a Government-owned vessel.

The shipyard here, as in *West*, was to have complete re-

sponsibility and control of the making of repairs (Ship Repair Contract, Article 5(a), S.A. [1] 22).

Under the repair contract here, the Government was also given the right to inspect the work and materials to insure compliance with the contract; and for that purpose, the Government placed only one (not six, as in *West*) of its men on board the vessel, to check the progress of the work, and to verify the quality and completion thereof.

The Government's surveyor here, too, did not sign any shipping articles and had no "control of the ship in the ordinarily accepted context," or the details of the shipyard's work, his sole function being to serve as an inspector for the Government. The Government's surveyor did not participate in the work in any manner, nor did he give any instruction or orders to the shipyard employees. In fact, Baum, as did the plaintiff in *West*, took his orders from his foreman, Mr. Matthews. As did the plaintiff in *West*, "he knew who was in control" of the vessel (*West*, supra, 4 L. Ed. 2d 161, 165).

Here, as in *West*, the "work of repair" created the allegedly unsafe condition. If the use by the labor gang of empty five gallon paint buckets to haul debris from the interior of the vessel was dangerous, per se, which we do not for a moment concede, this was certainly part of the repair work necessary to reactivate the vessel in compliance with the terms of the contract. If, however, it was only when the plaintiff insisted on working directly below where the laborers were using the buckets that an unsafe condition was created, which we feel to be the case, then it cannot be said that the "work of repair" did *not* create the danger which made that area unsafe. The work on the valves in the engine room, Baum's responsibility, was repair work every bit as much as was the clean-up work being done by the labor gang; and when Baum chose

to perform his repair work in direct conflict with the laborers' repair work, the unsafe condition was created--a condition of which the Government surveyor could not, and did not, have any knowledge, and over which he had no control.

The allegedly unsafe condition of which plaintiff here complains was not a 'latent' one, but one which was created, if at all, by the plaintiff himself when he insisted on working beneath the buckets. There was no "hidden defect" in either the laborers' use of the buckets, or the valves which Baum was to repair. Baum *knew* full well that he was not supposed to work beneath the buckets, and, in fact, that it could well be dangerous to do so. The risk assumed by Baum, here, was one which he knew was inherent in working below the buckets, and the Government was under no duty to protect him from said risk, even had it had an opportunity to do so.

Hence, and with all due respect, we submit that this Court's decision in *West*, supra, is controlling here, and that under the facts of this case, the Government owed no duty to furnish the plaintiff with a safe place to work.

* * * * *

Turning now to the subsidiary questions we raised at the outset herein, we shall attempt to dispose of them as briefly as possible, in the order in which they were presented.

I

THE GOVERNMENT DID NOT RETAIN CONTROL OF THE VESSEL OR THE DETAILS OF THE CONTRACTOR'S WORK

Plaintiff contends that because the Government surveyor had authority to enforce the safety requirements of the contract (Petition: pp. 7-9, 13), the Government retained sufficient control of the vessel and the details of the shipyard's

work so as to impose upon it a duty to see to it that the shipyard employees were furnished with a safe place to work.

An examination of other pertinent provisions of the contract, however, reveals the following:

1. Upon entering the shipyard, complete custody and control of the vessel, within the limitations of the contract, was surrendered by the Government to the Contractor. [Article 5(*a*), S.A. [1] 22];

2. The Contractor was to furnish all labor, materials, supplies, equipment, facilities and *services* [Article 3(a), S.A. [1] 16], subject to the Government's right to approve and reject materials furnished under the terms of the contract [Article 4(a) S.A. [1] 18];

3. The Contractor's performance of the work was subject to inspection, testing and rejection by the Government [Article 4(c), S.A. [1] 19];

4. The Government could determine need for change orders [Article 6(a), S.A. [1] 22]; and

5. The Government would certify satisfactory completion of the work upon completion of the work by the Contractor in compliance with the terms of the contract [Article 3(e), S.A. [1] 17].

A reading of the entire contract, and the Government surveyor's testimony that he had no control over the shipyard's *procedure* of work, never gave any instruction or orders to the shipyard personnel, and indeed, that his sole function was one of inspection and supervision, coupled with the fact that the plaintiff himself took *his* orders from his leaderman, and not the Government surveyor, makes it abundantly clear that the powers given the Government surveyor under the contract were designed solely to enable him to see to it that the

shipyard completed the contract according to the terms and specifications thereof, at a minimum cost to the Government.

Consequently, the Government did not have the degree of control over the ship or the repairs required to impose upon it a duty to furnish plaintiff with a safe place to work. *West v. United States*, supra; *Moye v. Sioux City and New Orleans Barge Lines, Inc.*, 402 F. 2d 238 (5th Cir. 1968), cert. den. 395 U.S. 913.

Two cases worthy of special comment here are *Gallagher v. U. S. Lines Co.*, 206 F. 2d 177 (2nd Cir. 1953), and *Filipek v. Moore-McCormack Lines*, 258 F. 2d 734 (2nd Cir. 1958).

In *Gallagher*, the contract in question provided for the handling of the loading operations by the Contractor "in the order directed by and manner satisfactory to the Owner." It further provided that the Contractor "shall use such equipment approved by the Owner as is best adapted for the proper and safe handling of the cargo . . ."

Said the Court:

> ". . . a general ability to control the work in order to insure that it is satisfactorily completed in accordance with the requirements of the contract does not of itself make the hirer of our independent contractor liable for harm resulting from negligence in conducting the details of the work . . . The hirer 'must have the power to control the manner of performing the very work in which the carelessness occurred' . . .
>
> "Consequently, in the case at bar United's liability turns on the interpretation of the contract between it and Hogan in respect to the control retained by the former over the stevedore's activities. We do not think that by giving United a general power to approve the

> equipment to be used the intent of the parties to this contract was to reserve to United the detailed control that would make it liable for the injury to the plaintiff's decedent. United never exercised any control over the details of the work, which is some indication of what the parties and the contract intended . . . Moreover, when the clause in question is read in conjunction with the rest of the contract it is clear that the power of approval over the equipment was only reserved to insure that Hogan complied with its contract to do the stevedoring work on United's vessels, rather than to regulate the details of the work."

And, quoting from the *Filipek* opinion:

> "It is likewise clear that the plaintiff's charge that the defendant was negligent in failing to see that work was done safely is without merit. While certain of the ships officers were present during the testing of the equipment, it is apparent that they were there not to direct the work or participate in it in any way, but merely as observers. The work of Filipek and the other Eastern employees was actually supervised by Eastern's foreman (as in our case). No orders were in fact given by any of the ship's officers (nor by the Government surveyor here). The mere presence of some of the ship's officers placed no duty on Moore-McCormack to see that the work was being done in a safe manner by Eastern's employees (citing *Gallagher*, supra).

Reference may also be had, we submit, to *U.S. v. Page*, 350 F. 2d 28 (10 Cir. 1965) and *Kirk v. U.S.*, 270 F. 2d 110 (9th Cir. 1959), which cases, though not federal maritime cases, nevertheless stand for the principle of the law of agency and independent contractors that the reservation in a contract of

the right to inspect the work and facilities of the independent contractor, including the contractor's adherance to contract safety provisions, and to stop the work if the provisions of the contract are not being carried out, is not sufficient to render the owner liable for the negligence of the contractor — especially in view of the fact that this very principle of law was adhered to in *West*, supra, *Gallagher*, supra, and *Filipek*, supra, all of which are federal maritime cases.

II

THE ALLEGED UNSAFE CONDITION WAS NOT A "LATENT" ONE, CREATED PRIOR TO THE GOVERNMENT'S RELINQUISHMENT OF CONTROL OF THE VESSEL

This Court, in *West*, supra, stated that "there might be instances of hidden or inherent defects, sometimes called 'latent', that would make the owner guilty of negligence, even though he had no control of the repairs. . ."

Apparently, this was the basis of the finding of liability in *Van Horn v. Gulf Atlantic Towing Corp.*, 388 F. 2d 636 (4th Cir. 1968), and *White v. U.S.*, 400 F. 2d 74 (4th Cir. 1968), both of which cases were cited by plaintiff at pages 17 and 19 of his Petition; for in each of those cases the shipowner had control of the vessel at the crucial time--the creation of the dangerous condition.

In our case, however, it is manifest that the dangerous condition, if one did in fact exist, was only created after the Government relinquished control of the vessel to the shipyard.

III

THE "WORK OF REPAIR" CREATED THE ALLEGED UNSAFE CONDITION

Plaintiff contends, at page 19 of his Petition, that "the repair work contracted for did not create the unsafe condition – the long-continued known dangerous practice of hoisting debris in discarded paint cans did," and that consequently this Court's opinion in *West* is not applicable here. Instead, plaintiff reads *West* as limited to situations where the injury is caused by the very defect the shipyard is hired to repair (Petition, p. 18).

We do not agree that *West* is so limited. Although the plaintiff, in *West*, *was* injured by one of the very items the shipyard had been hired to repair, the language used by this Court in that opinion does not seem to contain any such limitation as contended for by the plaintiff herein. Referring again to that language:

> "It appears manifestly unfair to apply the requirement of a safe place to work to the shipowner when he has no control over the ship or the repair, and *the work of of repair in effect creates the danger which makes the place unsafe* . . . The respondent . . . was under no duty to protect petitioner from risks that were inherent in the carrying out of the contract."

Van Horn, supra, does not, as contended by plaintiff, state that West contains the limitation he insists it does, but instead, distinguishes *West* as a situation where the shipower had no control of the vessel when the dangerous condition was created.

And *White v. United States*, supra, merely states that "We read West . . : as limited to instances in which the work of repair created the unsafe condition."

Here, as in *West*, the plaintiff was injured by the "work of repair." The shipyard had been hired to repair and overhaul the valves in the engineroom, among other things, and this was what plaintiff was doing when he was injured. Furthermore, the Contract provides [in Article 3(e), S.A. [1] 17] that "completion of the work covered by the job order) shall include the removal from the vessel of . . . all scrap and rubbish resulting from the work;" and this is precisely what the labor gang was doing, in a manner which had long been customary and general within the industry--and this is precisely what caused plaintiff's injuries.

The opinion of the Fifth Circuit Court of Appeals herein is not, as plaintiff contends, in conflict with its earlier opinion in *Stark v. United States*, 413 F. 2d 253, 254 (5th Cir. 1969). In *Stark*, the Court stated that "We read *West* . . . as limited to instances in which the repair work created the unsafe condition." It went on, however, to distinguish that case from *West* on the basis that there, the dangerous condition or latent defect existed *prior* to the turning over of the ship to the contractor.

The Court below held that "whether the actual injury is caused by the object being repaired or by other work being done in the vicinity is not cause for distinction where the risk is equally presently in both situations. In both the repair work creates the unsafe condition."

With deference we submit that the Court below was correct in so holding, and that *West* is not as limited as the plaintiff insists it is.

IV

THE GOVERNMENT, THROUGH ITS MARINE SURVEYOR, HAD NO KNOWLEDGE, ACTUAL OR CONSTRUCTIVE, OF ANY DANGEROUS CONDITION ON THE VESSEL

Plaintiff argues that "a shipowner possessing knowledge of its contractor's dangerous methods and practices, and having sufficient opportunity and power to prevent their use, should be held liable to the contractor's employees who may be injured by such practices if the shipowner fails to exercise its right and powers to eliminate the danger." (Petition, p. 22).

He also contends that the decision of the Court below, that "there is no evidence here that the Government inspector had knowledge of any dangerous defect," conflicts with this Court's holdings in *Albanese v. N. V. Nederl. Amerik Stoomv. Mats.*, 382 U.S. 283, 15 L. Ed. 2d 327, 86 S. C. 429 (1965) and *United New York & N. V. S. H. Pilots Asso. v. Halecki*, 358 U.S. 613, 3 L. Ed. 2d 541, 79 S. Ct. 517 (1959).

As we read the cases, however, a shipowner's actual or constructive knowledge of a dangerous condition created by the contractor will not impose a duty on the shipowner to see to it that such condition is corrected *if* (1) the shipowner has no control over the vessel or the repair work, (2) the work of repair in effect creates the dangerous condition, and (3) the dangerous condition does not arise from a hidden, inherent or "latent" defeat created prior to the shipowner's relinquishment of the control of the vessel. *West*, supra.

With regard to *Halecki*, supra, this Court, in *West*, said:

> "Nor was United New York & N.J.S.H. Pilots Asso. v. Halecki . . . a similar situation. In that case the shipowner directed the use of carbon tetrachloride in the

> confined spaces of the engine room. The resulting fumes fatally injured the shore-based workman, necessitating a remand on the negligence question. *But here the owner had no control of the ship;* it had been turned over to a repair contractor for extensive overhaul, which was not performed under the direction of the shipowner."

Thus, *Halecki*, where the shipowner was charged with knowledge that carbon tetrachloride was dangerous to human life, was distinguished from the facts in *West* on the basis that in *Halecki* the shipowner had not relinquished control of the vessel, and had, in fact, directed that the carbon tetrachloride be used in the engine room.

In *Albanese*, supra, too, the shipowner had apparently retained control of the vessel, for this Court, in its opinion, made absolutely no reference to the control factor. It cited in its opinion the case of *Gutierrez v. Waterman S. S. Co.*, 373 U.S. 206, 10 L. Ed. 2d 2997, 83 S. Ct. 1185 (1963), wherein the ship was obviously still in the control of the shipowner, for there the ship was merely being unloaded when the injured longshoreman slipped and fell on some beans which had been spilled on the pier.

Certain it is that actual or constructive knowledge on the part of a shipowner of a dangerous condition created by an independent contractor *can* cast liability on the shipowner if it fails to take reasonable steps to correct the dangerous condition and the condition results in injury to an employee of the independent contractor; but *not* where the ship has been completely turned over to the contractor for extensive repairs, the shipowner has retained no control over the vessel or the work, the work itself creates the danger, and the danger is not the result of a hidden, latent defect in existence before the

shipowner turned the vessel over to the contractor. *West* supra.

The Second Circuit's later opinion in *Albanese v. N.V. Nederl. Amerik Stoomv. Matts*, 392 F. 2d 763 (2nd Cir. 1968), wherein it is stated that "regardless of the shipowner's control or lack of it, he still has a nondelegable duty to use reasonable care to *keep* the area a safe one in which to work" is either in headlong conflict with *West*, and therefore erroneous, or merely refers to situations where the shipowner may not have control over the work but still retains control of the vessel on which the work is taking place.

The opinion of the Court below is not in conflict with *Aldridge v. States Marine Corp. of Delaware*, 265 F. 2d 554 (9th Cir. 1959) either, as in that case the vessel was in complete control of the owner and, in fact, the ship's officers, though specifically requested to, refused to provide the longshoremen with proper tools to perform their work.

At any rate, plaintiff's arguments regarding the Government's knowledge vel non of a dangerous condition are, we submit, unfounded in the first instance, because, hopefully, we have already shown that the use per se of empty five gallon paint buckets to haul debris from vessels is *not* inherently dangerous, and further, that the Government's surveyor could not possibly have known that the plaintiff would disobey his instructions, and stubbornly insist on working directly beneath where the buckets were being used, knowing all the while that to do so placed him in a position of potential danger.

CONCLUSION

Plaintiff insists that we apply the Public Vessels Act, 46 U.S.C. §781, and the federal maritime law, rather than the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2674, and the law of the place where the wrongful act or omission occurred, in determining whether or not the Government, under the facts of this case, owed a duty to the plaintiff to provide him with a safe place to work.

We have done so!

The federal maritime cases clearly demonstrate that, under the facts of *this* case, the Government did *not* owe the plaintiff any duty to provide him with a safe place to work.

Nor does the opinion of the Fifth Circuit Court of Appeals herein conflict with any of the cases cited in the plaintiff's petition. Instead, it is in complete accord with the federal maritime law which governs the facts of this case.

Therefore, we submit with the greatest deference that there has been no showing by Petitioner of a need for this Court to exercise its power of supervision, and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO CERTIFY that copies hereof have been furnished the following counsel, by U. S. Mail, this 30 day of September 1970:

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